No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Are fourth amendment rights violated when the police make an arrest for a minor misdemeanor, absent any exigent circumstances, on the uncorroborated allegations of a supermarket guard where the arresting officers (1) refused to interview available witnesses, (2) conducted no independent investigation, (3) never knew the guard or otherwise established his reliability, and (4) repeatedly refused or declined to hear the petitioner's version of the dispute when he denied the guard's allegations?

2. Has a private supermarket engaged in "state action" in violation of 42 U.S.C. Section 1983 where it knowingly engages in a customary plan or working agreement with the local police

(a) whereby the police allow the attesting of the necessary signatures to a store form-complaint out of the presence of the authorized state official in violation of state law and cause the perjurious document to be filed in the state court to initiate criminal charges, and/or

(b) whereby the police, without independent investigation or probable cause, will arrest anyone the store detains for shoplifting and designates for arrest?

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ARGUMENT

I.

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE VIOLATED AND THE JUDGMENT OF THE SEVENTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT, THREE OTHER FEDERAL CIRCUITS, AND THE STATE OF ILLINOIS.

A. The Decision Of The Seventh Circuit Is In Conflict With Decisions Of The Fifth, Eighth, and Tenth Circuits.

Respondents in their opposing brief attempt to rewrite the holding of the Seventh Circuit in the case at bar. In

their attempt to distinguish the authorities cited by petitioner, the respondents argue:

> "None of the cases involved an independent police investigation prior to the arrest as was performed in the instant case." (Resp. Br. p. 2).

This argument flagrantly misstates the Seventh Circuit Opinion in this case. The legal issue at bar is whether the police have probable cause to make a warrantless arrest of petitioner upon the uncorroborated misdemeanor complaint of a retail store security guard, whose reliability was not established, without interviewing witnesses who were available at the scene, or conducting any other independent investigation. The Fifth, Eighth, and Tenth Circuits have answered that question in the negative. (Pet. Cert. pp. 15-17). The Seventh Circuit at bar answered that question in the affirmative, and has framed the issue clearly in its Opinion (App. 10):

> "We therefore take only the facts on which there is no genuine dispute. Vaughn, a store guard, told the police that he saw Gramenos put items in his pocket and try to leave the store with them, and that Gramenos ran wildly through the aisles scattering food after being confronted. Vaughn filled out a criminal complaint and signed it in the presence of the two officers. Gramenos denied everything (except walking quickly through the aisles). *The police interviewed no one else and took Gramenos away. Did they have probable cause?*" (emphasis added). *Gramenos v. Jewel, et al.*, 797 F.2d 432, 438.

The fact that there was no independent investigation at bar is also clear from the Seventh Circuit's own summary of the case in its November 18th Opinion in *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986), wherein the court stated:

> "In *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986), this Court concluded that there is no general duty to investigate further after acquiring information sufficient to establish probable cause. *Id.* at 437-442. In that case the police arrested the plaintiff for shoplifting. The security guard at the store told police that he saw the plaintiff running down the aisles pulling items from his pockets; plaintiff denied this to the police. The Court rejected plaintiff's contention that the police should have questioned other witnesses before arresting him. *Gramenos* essentially involved a credibility contest between the plaintiff and a store security guard." 806 F.2d at 127, n.1.

Respondents' reliance on this factor of independent investigation as a distinguishing characteristic is misplaced. There was no independent police investigation in this case. The store security guard told the police to arrest petitioner, and they did. The police never interviewed the store manager, who would have contradicted the guard's allegations, or other witnesses who would have been material witnesses as to the issue of probable cause to arrest. This is the basis of the 1983 action, and has been petitioner's position since the onset of this litigation. This is also the basis of the Seventh Circuit's Opinion at bar. In its opinion the court stated that the police "may have exercised poor judgment" (App. 7), but concluded that no independent investigation was required, holding (App. 17):

> "We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices."

For respondents to attempt to argue at this stage in the litigation that there was independent police investigation, when the Seventh Circuit concluded that there was not,

is merely an attempt to avoid the clear conflict between the Seventh Circuit Opinion and the holdings of the other Federal Circuits. In misdemeanor cases involving private store security guards the Fifth, Eighth, and Tenth Circuits require independent investigation by the police, prior to arrest, in order to establish probable cause. (Pet. Cert. pp. 15-17).

B. The Decision At Bar Is In Conflict With Other Decisions Of The Seventh Circuit.

Respondents' Brief does not even attempt to distinguish *Butler v. Goldblatt Bros. Inc.*, 589 F.2d 323 (7th Cir. 1978). (Pet. Cert. pp. 18-19). That case stressed the necessity of independent investigation by the police to corroborate information received by a store security guard in order to establish probable cause. In *Butler*, The Seventh Circuit concluded,

> "Is is equally apparent that the officers did not have reasonable grounds for believing the information to be reliable, since they did not undertake an independent investigation to corroborate the details of the accusations . . . a reasonable man could not find that the arrests were based upon probable cause." 589 F.2d at 325-326.

In this case, respondents challenge the applicability of *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985), arguing that *Moore* involved a warrantless arrest at plaintiff's campsite, as opposed to an arrest at the scene of the alleged crime. (Resp. Br. p. 4). This argument misses the thrust of the Seventh Circuit's analysis and holding in *Moore*. The critical factors identified by the court in *Moore* were that: (1) *Moore* involved a misdemeanor, as opposed to a felony; (b) there was no serious or immediate threat to anyone's safety; and (c) a huge amount of money was not involved in the dispute. 754

F.2d 1336, 1345 (7th Cir. 1985). *Moore* holds that under those circumstances police are obligated to conduct an independent investigation prior to arrest in order to establish probable cause. The court stated,

> "It is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention." *Id.* at 1345-46.

In *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985), the Seventh Circuit balanced the amount of information available to the police with the situation they faced to decide whether probable cause to search existed. The court determined that,

> "The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition." 763 F.2d at 1566-67.

Comparing *Moore* and *Llaguno* with the case at bar, it is evident that the arresting officers did not have the requisite probable cause to arrest petitioner. There was no fear that petitioner, clearly identified to police as an attorney, was about to flee. The allegation of shoplifting was not a serious crime, and there was no threat of its imminent repetition. The Jewel store was closing for the evening. The witnesses identified by petitioner were available and present at the scene of the alleged offense, and an independent investigation could have easily been conducted by the police prior to deciding whether to invoke the awesome power of arrest.

Petitioner also relied upon *Beck v. Ohio*, 379 U.S. 89 (1964), both in the Seventh Circuit and in his Petition before this Court. (Pet. Cert. pp. 19-21). The Seventh Cir-

cuit ignored this case, making no reference to it in the Opinion. Instead, the Seventh Circuit applied a lower standard of probable cause to deny petitioner relief.

C. The Decision At Bar Conflicts With Decisions Of This Honorable Court Inasmuch As The Seventh Circuit Applies A "Lower Standard Of Probable Cause" To Validate Petitioner's Arrest.

Respondent acknowledges that the Seventh Circuit said that *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), were "both overruled (in favor of a lower standard of probable cause) by *Gates*." (Resp. Br. p. 5) (App. 13). However, respondent argues that this *lower standard of probable cause* was never applied, and that the Opinion of the Seventh Circuit purportedly shows that the "totality of the circumstances" test was applied (citing the Seventh Circuit Opinion at 797 F.2d 439-440). (Resp. Br. 5). This is not correct. An examination of the Seventh Circuit's Opinion fails to reveal any mention of the term, "totality of the circumstances". The fact of the matter is that the reason the Seventh Circuit made reference to the new "lower standard of probable cause" in this case was because the court applied it to justify the arrest of petitioner on the uncorroborated allegations of an unreliable informant. Johnny Vaughn, the part-time Jewel security guard, was unknown to the police prior to this incident. (App. 6). Moreover, Vaughn had been convicted of a criminal offense. (R. 94-V, pp. 43-45, 55). Under those circumstances petitioner's arrest would not have been valid prior to the decision of this Honorable Court in *Illinois v. Gates*, 462 U.S. 213 (1983), nor is it valid after *Gates*.

However, in this case, the Seventh Circuit created a new "supermarket guard" exception to the reliable informer rule. The court noted that "Even before *Gates*,

a single tipster could supply probable cause to issue a search or arrest warrant, if the police had reason to think that the informant had firsthand knowledge and was reliable." (App. 13). In this case the Seventh Circuit then postulated a new rule for post-*Gates* cases. Their new rule is that the supermarket "guard is not just any eyewitness" and that "Police have reasonable grounds to believe a guard at a supermarket". (*Id.* at line 1). Based upon this reasoning, the Seventh Circuit found probable cause for petitioner's arrest without any need for independent investigation by the police. Thus, it is clear that the court utilized the "lower standard of probable cause" in reaching its decision in the instant case. The holding was not mere "dicta" as respondents suggest. (Resp. Br. p. 5). The Seventh Circuit's decision is as unprecedented as it is unjust.

This Honorable Court has never held that there is a *lower standard of probable cause* after *Gates*, nor has it ever sanctioned the transmutation of a private part-time security guard into a reliable informer. Nor has this Court ever reduced the standard of probable cause to a level where warrantless arrests may be made in a misdemeanor case where there is neither a reliable informer, nor independent investigation. Certainly not in *Gates*, where in the absence of a reliable informer, the police engaged in extensive independent investigation to establish probable cause. Certiorari should be granted at bar to resolve the conflict between the decisions of this Honorable Court and the Seventh Circuit.

D. The Seventh Circuit Decision Interpreting Illinois Law Is In Conflict With Decisions Of The Illinois Supreme Court.

The respondent represents to this Court that the Seventh Circuit Opinion in the case at bar has adopted the "total-

ity of circumstances" standard. (Resp. Br. p. 6). To the contrary, the Seventh Circuit Opinion nowhere mentions this standard as the basis for its decision.

Instead, the Seventh Circuit attributes to the State of Illinois a rule of law which is non-existent and less than the constitutional standard governing probable cause to arrest. The Opinion holds (App. 11-12):

> "Vaughn was an eyewitness. The facts he related to the police (if he told the truth) establish a crime. Vaughn said that Gramenos had passed the checkout counter and was about to leave the store. Gramenos's identity was not in dispute. In Illinois the report of an eyewitness to a crime is sufficient to authorize an arrest. E.g., *People v. Foss*, 18 Ill.App.3d 496, 499-500, 309 N.E.2d 677 (2d Dist. 1974). *The Supreme Court has not spoken on the question. . .*" (emphasis added).

This Honorable Court has never ruled on this issue, nor has any Illinois court so ruled, contrary to the assertion of the respondent.

II.

JEWEL'S ILLEGAL UTILIZATION OF THE CRIMINAL COMPLAINT AND THE CUSTOMARY PLAN OR AGREEMENT WITH THE POLICE MADE JEWEL A STATE ACTOR UNDER SECTION 1983.

Respondent argues that the abuse and utilization of the state criminal procedures by respondents, although in violation of state law, violated no federal law or constitutionally protected right. (Resp. Br. p. 7).

Petitioner has shown that his constitutional rights were violated pursuant to a customary plan and agreement which existed between the respondent Jewel and the police whereby the police would arrest any person named in the store complaint or "fingered" by a Jewel security guard

and put them in jail without a formal or lawful criminal complaint. (Pet. Cert. pp. 26-28).

In *Dennis v. Sparks*, 449 U.S. 24 (1980), this Court held that private parties acted under color of law when corruptly conspiring with a state judge in a joint scheme to defraud. In the case at bar, the customary plan or agreement included utilizing the state criminal complaint to jail and prosecute the petitioner in the state court by falsely attesting to the affidavit. (See copy, App. 29).

The verified record in this case is replete with documentation that the police would arrest anyone Jewel would name in their criminal complaint form without probable cause. For example, the arresting police officers, in their answer to petitioner's amended complaint, admitted that the arrest of petitioner was based solely on the respondent supermarket's criminal complaint. (R. 43, para. 4) (R. 32, paras. 9-11).

The respondents argue that this conduct of misuse or abuse of a state statute does not allow for a valid cause of action under Sec. 1983. (Resp. Br. p. 8). However, this Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), said that private parties are subject to liability under Sec. 1983 when engaged in a conspiracy with one or more parties acting under color of state law. This Court in *Adickes* held:

> "The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized or lawful; (citations omitted). Moreover, a private party involved in such a conspiracy, even though not an official of the State can be liable under Section 1983. . . ." *Adickes*, 398 U.S. at 152.

Petitioner has demonstrated, consistent with this Court's holding in *Adickes*, that petitioner's Fourth and Fourteenth Amendment rights were violated when respondents, under color of state law, utilized the Jewel store's criminal complaint form to arrest petitioner and/or jail and prosecute him.

CONCLUSION

For these further reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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